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OCT 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-781

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

TIMOTHY TILTON, et al. - - - Petitioners

versus

JEFFERSON COUNTY BOARD OF EDUCATION, et al. - - - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the creation of a cost exception to the procedural mandates of the Education For All Handicapped Children Act sets a dangerous precedent for variance from the Act as interpreted by this Court in *Rowley?*

II. Whether allowing a state to violate the terms of its "contract" under a federal grant-in-aid program impermissibly infringes upon the spending power of Congress?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

TIMOTHY TILTON, a minor, by his legal guardian and next friend, MONA RICHARDS;
ROBERT McDANIEL, a minor, by his parent and next friend, ANITA McDANIEL;
DEL SHAWN MORRIS, a minor, by his parent and next friend, REGINA MORRIS;
By themselves and on behalf of all others similarly situated - - - - - - - - - - *Petitioners*

v.

JEFFERSON COUNTY BOARD OF EDUCATION;
SCOTT DETRICK, LYMAN JOHNSON, ANTHONY GAMBOA, MICHAEL W. WOODEN, WILLIAM STITES, JAMES HEARN, C. B. YOUNG, JR., members of the Jefferson County Board of Education;
DAVID DeRUZZO, Superintendent of the Jefferson County Schools;
REGINALD GREEN, Director of School Programs in Jefferson County;
DAVID WEBER, Director of Special Education in Jefferson County;
KENTUCKY DEPARTMENT OF EDUCATION;
RAYMOND BARBER, Superintendent of Public Instruction for the Kentucky Department of Education;
BILLIE DOWNING, Head of the Bureau of Exceptional Children in the Kentucky Department of Education;
SHARON EMBRY, Coordinator for Non-Public School Programs in the Kentucky Department of Education;
DEPARTMENT OF HUMAN RESOURCES;
GRADY STUMBO, Director of the Department of Human Resources in the State of Kentucky;
All of the above named individually and in their official capacity - - - - - - - - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Appellants in the court below respectfully petition for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on April 19, 1983 and was officially reported at 705 F. 2d 800 (App. A). The order denying the petition for rehearing *en banc* was entered August 1, 1983 (App. B). The final order and opinion of the United States District Court for the Western District of Kentucky was entered on June 5, 1981 (App. C).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 19, 1983 (App. A). The petition for rehearing *en banc* was denied on August 1, 1983 (App. B). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 1:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Amendment XIV, Section 5:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTORY PROVISIONS INVOLVED

Education for All Handicapped Children Act, Pub. L. 94-142, 20 U.S.C. §1401 *et seq.* (Cited text at App. G). Section 1415(e)(3):

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

STATEMENT OF CASE

Petitioners, severely emotionally handicapped children, seek review through their next friends of the ruling in this case by the United States Court of Appeals for the Sixth Circuit which held "that if a state or local agency must discontinue or close a facility for purely budgetary reasons, the requirements of 20 U.S.C. §1415(e)(3) do not apply." *Tilton* v. *Jefferson County Bd. of Educ.*, 705 F. 2d 800, 805 (6th Cir. 1983) (App. A). Solely on this basis, the Court of Appeals affirmed the district court's denial of the children's motion for a preliminary injunction and the dismissal of their action nine days after its filing.[1]

All children were attending Jewell Manor Day Treatment Center on May 5, 1981, the date that the respondents announced that Jewell Manor would be closed effective May 29, 1981. Each child was placed at Jewell Manor in accordance with his individualized educational program (IEP) which had been developed by the Board of Education in compliance with the Education for All Handicapped Children Act, 20 U.S.C. §1401(19). Jewell Manor provided the only year-round educational program in Jefferson County. Additional unique features of the program included education and related therapy coordinated by specially trained teachers and social workers, and parent counselling by social workers who assisted in applying theraputic techniques at home.

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[1]The district court dismissed the complaint on its own motion, prior to the filing of any answer or other responsive pleading.

Seeking to prevent any change in their educational placements prior to the opportunity to complete the administrative review processes established by the Act, 20 U.S.C. §1415(e)(3), the children filed this action on May 27, 1981 on behalf of themselves and other severely emotionally disturbed children similarly situated.[2] They sought to prevent any change in their educational placement by enjoining the closing of the facility unless the respondents provided substantially similar services to the students until the administrative review processes were completed. The children relied in part on 20 U.S.C. §1415(e)(3) which states:

> During the pendency of any proceedings conducted pursuant to this Section, unless the State or local educational agency and the parents or guardian otherwise agree, the child *shall remain* in the current educational placement. . . . until all such proceedings have been completed. 20 U.S.C. §1415 (e)(3) (emphasis added.)

The district court denied the motion for a temporary restraining order on May 27, 1981 and set a hearing on the motion for a preliminary injunction for June 2, 1981. At the close of the children's evidence on June 3, 1981, the court denied the motion for a preliminary injunction and on June 5, 1981 entered an order dismissing the action. The district court's reasoning was that the program offered at Jewell Manor was primarily for treatment rather than education and

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[2]Jurisdiction was conferred on the district court pursuant to 20 U.S.C. §1415(e)(4) and 28 U.S.C. §§1331 and 1343(3) and (4). The district court did not rule on class certification.

therefore the procedural protections of the Act did not apply.

The children initiated a proper appeal from the district court ruling to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §2107. Relying on different grounds, the Court of Appeals affirmed the dismissal by the district court in *Tilton* v. *Jefferson County Bd. of Education,* App. at 21, decided on April 19, 1983. The Court of Appeals found the district court's distinction that Jewell Manor was primarily a treatment facility and therefore outside of the scope of the Act to be "without merit . . ." *Id.,* at 23. The Court of Appeals stated "any attempt to distinguish academics from treatment when defining 'educational placement' runs counter to the clear language of the Act. There can be no question that plaintiffs' assignment to Jewell Manor was an educational placement within the meaning of the Act." *Id.,* at 23.

The court also held "that the closing of Jewell Manor and transfer of these plaintiffs was a change in placement" under the Act as the evidence indicated that "programs at alternative schools are not comparable to the Jewell Manor program. Most significantly, all of the alternative programs were limited to 180 day programs whereas Jewell Manor provided year-round instruction." *Id.,* at 25.

Despite the above findings, the Court of Appeals affirmed the lower court ruling. The court recognized that "in the usual case, a change in placement cannot take place absent the procedural protection of §1415,

including the requirement imposed by §1415(e)(3) that the child remain in his or her 'current educational placement' during the pendency of any proceedings initiated pursuant to §1415. *Id.*, at 25. The Court held, however, that the requirement of §1415(e)(3) that the status quo be maintained did not apply "if a state or local agency must discontinue a program or close a facility for purely budgetary reasons". *Id.*, at 28. The ruling did not directly address the children's alternative request for the provision of substantially similar services while the administrative processes were pursued.

An order was entered on August 1, 1983 denying the children's petition for rehearing *en banc*.

REASONS FOR GRANTING WRIT

I. The Creation of a Cost Exception to the Procedural Mandates of the Education for All Handicapped Children Act Sets a Dangerous Precedent for Variance from the Act as Interpretated by This Court in *Rowley*.

This Court clearly articulated the importance of the procedural safeguards mandated by Congress, in its only pronouncement to date on the Education for All Handicapped Children Act:

> When the elaborate and highly specific procedural safeguards embodied in §1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large meas-

> ure of participation at every stage of the administrative process. . . .

Board of Education v. *Rowley,* 458 U. S. 176, 205 (1982). This court further emphasized the importance of the procedural aspects of the Act by directing that a court's inquiry should be whether the state has complied with the procedures set forth in the Act. *Id.,* at 206. These procedures are clearly delineated. The Act provides a comprehensive system of procedural safeguards to ensure that fundamental decisions concerning the education of handicapped children are made correctly and with appropriate involvement from the parents and guardians of these children. 20 U.S.C. §1415. As a condition for receipt of federal money, a recipient State must guarantee each parent and child the procedural safeguards explicitly detailed in the Act. 20 U.S.C. §§1412(2), (4), (5), and 1414(a)(7).

The Act provides that a parent or guardian is to be given notice prior to any change in the "identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child", 20 U.S.C. §1415(b)(1)(C); shall have the opportunity for an "impartial due process hearing" when he disagrees with the decision of the educational agency or unit concerning the child's education; and shall have the right to judicial review of decisions from the administrative level. 20 U.S.C. §§1415 (b)(2), 1415(c), 1415(e)(2).

The controlling statutory provision for this case, 20 U.S.C. §1415(e)(3), states:

> During the pendency of any proceedings conducted pursuant to this Section, unless the State or local educational agency and the parents or guardian otherwise agree, the child *shall remain* in the then current educational placement of the child. . . . until all such proceedings have been completed (emphasis added).

This provision operates as an automatic injunction to prohibit the change of placement of a handicapped child until all required procedures have been completed, unless agreed to by both the parent and the educational agency.[3] Congress provided no statutory exception to this requirement.

Despite the clear language of the Act and this Court's emphasis on the importance of its procedural safeguards, the Sixth Circuit denied each handicapped student's right to any procedural protection.

> We hold, then, that if a state or local agency must discontinue a program or close a facility for purely budgetary reasons, the requirements of 20 U.S.C. §1415(e)(3) do not apply. The Judgment of the District Court is Affirmed.

App. at 28. This holding eviscerates the statutory procedures held so important in *Rowley*.

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[3]This section applies equally to parents and states. No cost exception has been recognized for parents, who must bear all expenses if they unilaterally remove their children without first going through the required procedures. *Monahan* v. *State of Nebraska*, 645 F. 2d 592, 597-8 (8th Cir. 1981). "[W]hoever was paying for the placement prior to review shall continue to do so while review is pending." *Doe* v. *Anrig*, 692 F. 2d 800, 810 (1st Cir. 1982). The Bureau of the Education for the Handicapped is in accord with this view. 2 EHLR 95-6 (App. H).

The drafters of the Act considered the procedural safeguards so important that Congress took the extraordinary step of incorporating an automatic stay into the express language of the statute. The stay, which acts to prohibit any change in placement until full compliance with the safeguards, has been consistently recognized and applied by other circuits.[4]

In this case, there was *no* compliance with the prescribed statutory procedures. Respondents unilaterally terminated each child's individually approved educational placement despite parental attempts to invoke the administrative procedures of §1415. The summary removal of handicapped students from their IEP-approved placement, without regard to the procedural and substantive guarantees of the Act, contravenes express Congressional requirements.

While Congress allowed for no exception, the Sixth Circuit in *Tilton* created a judicial exception solely

[4]In *Doe* v. *Anrig*, 692 F. 2d 800, 810 (1st Cir. 1982), the court found that §1415(e)(3) was designed to preserve the status quo and amounted to an automatic stay. The Second Circuit is in substantial accord with this view. *See Vander Malle* v. *Ambach*, 673 F. 2d 49 (2d Cir. 1982), and *Zvi D.* v. *Ambach*, 694 F. 2d 904, 906 (2d Cir. 1982). The Third Circuit likewise recognized that continued funding pending administrative proceedings is required. *Grymes* v. *Madden*, 672 F. 2d 321 (3d Cir. 1982). The Fifth Circuit also recognizes the importance of §1415(e)(3) in maintaining the status quo pending review. *Stacey G.* v. *Pasadena Independent School District*, 695 F. 2d 949, 953 (5th Cir. 1983). Most recently, the United States District Court for the District of Columbia noted the importance of the "automatic stay" provisions of the Act in assuring that "the true status quo is maintained, as is the continuity of the child's education." *Jacobsen* v. *District of Columbia Board of Education*, 564 F. Supp. 166, 170 (D.D.C. 1983).

on the basis of cost. No cost exception was intended because Congress was well aware that a state electing to participate in the program would be required to incur continuing financial costs. Congressional intent was clearly evidenced by the following legislative history:

> The Committee rejects the argument that the Federal Government should only mandate services to handicapped children if, in fact, funds are appropriated in sufficient amounts to cover the full cost of this education. The Committee recognizes the State's primary responsibility to uphold the Constitution of the United States and their own State Constitution and State laws as well as Congress' own responsibility under the 14th Amendment to assure equal protection of the law.

S. Rep. No. 94-168, 94th Cong., 1st. Sess. 22, *reprinted in* 1975 U. S. Code Cong. & Ad. News 1446. To similar effect, *see* 121 Cong. Rec. 37025 (1975) (remarks of Rep. Mink) and 121 Cong. Rec. 19503 (1975) (remarks of Sen. Cranston).

Thus, there is no support in the legislative history for the position that respondents may, solely for financial reasons, ignore the procedural requirements of the Act. Rather, Congress specifically intended that the States rely not only on federal moneys but be financially responsible for implementing the Act.

The Sixth Circuit's fear of a "wholesale transfer of authority over the allocation of educational resources", App. at 26, is simply unfounded. A State may choose not to participate in the program. The

Commonwealth of Kentucky has elected to participate while one state, New Mexico, has not. *Rowley,* 458 U. S. at 183-4. For this participation the State received additional educational moneys to help provide appropriate educational services for handicapped children in Kentucky.[5] 20 U.S.C. §1411. There cannot be a "wholesale transfer of authority" where the State voluntarily elects to participate in the program.

Moreover, handicapped children ask for no authority over the budgetary decisions of state and local governments. They seek merely to be afforded the procedural protections of §1415(e)(3) and thereby to secure their right under the Act to receive the opportunity for some educational benefit.

This case is not about the transfer of power to close a school; rather, it is about the wholesale termination of individual student's rights because they belong to a group of handicapped students. The State cannot be allowed to avoid its obligations to individual handicapped students upon the pretext of treating them as a group.

Since *Tilton* was decided two other circuits have addressed the effect of state economic considerations on the requirements of the Act and reached different conclusions. In *Fallis* v. *Ambach,* 710 F. 2d 49, 56 (2d Cir. 1983), the Second Circuit relied heavily on *Tilton*

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[5]Kentucky also receives federal moneys for the provision of education to handicapped children under Title I of the Elementary and Secondary Education Act of 1965, Pub. L. 89-313, now superseded by the Education Consolidation and Improvement Act of 1981, Pub. L. 97-35, 20 U.S.C. §§2844 *et seq.*

to preclude the application of §1415(e)(3) as it would frustrate the State's fiscal policies. One month later the Fifth Circuit rejected a lack of funds defense in *Crawford* v. *Pittman,* 708 F. 2d 1028 (5th Cir. 1983), concluding that Mississippi could not rigidly refuse to consider programs of more than 180 days for handicapped children. The Fifth Circuit noted that "rigid rules . . . violate not only the Act's procedural command that each child receive individual consideration but also its substantive requirements that each child receive some benefit and that lack of funds not bear more heavily on handicapped than nonhandicapped children." *Id.,* at 1035.

There is a clear and growing divergence among the circuits. With state and local units facing increased funding pressures, the importance of this Court's guidance on the issue of a cost exception to the procedural requirements of §1415(e)(3) becomes even more imperative.

The Sixth Circuit violated the letter and spirit of the Act as interpreted by this Court in *Rowley* when it created a cost exception to the clear procedural dictates of §1415(e)(3). The budgetary constraints of States are undoubtedly known to Congress as well as to the courts. Congress may amend the procedural requirements of the Act if it so chooses, or the Commonwealth of Kentucky may stop applying for funds if it finds the requirements of the Act financially uncomfortable. In the absence of a finding of unconstitutionality, the federal courts may not invade the province of Congress. *King* v. *Smith,* 392 U. S. 309, 333 fn. 34 (1968).

II. Allowing a State to Violate the Terms of Its "Contract" Under a Federal Grant-In-Aid Program Infringes Upon the Spending Power of Congress.

This Court has long recognized that Congress may impose terms on the disbursement of federal moneys to the States pursuant to the Spending Power Clause.[6] U. S. Const., art. I, §8, cl. 1. In its exercise of this power, Congress spends for the general welfare through grant-in-aid programs. A key component of the federal grant-in-aid program is the power to offer federal moneys to state and local agencies upon the condition that the agencies comply with federally imposed requirements.

The Education for All Handicapped Children Act was enacted pursuant to the Spending Power clause and Section 5 of the Fourteenth Amendment. *Crawford* v. *Pittman*, 708 F. 2d 1028, 1036-38 (5th Cir. 1983). It is a typical grant-in-aid program in which the federal government gives money to the states in return for their agreement to spend the money in accordance with

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[6] *See, e.g., Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937) (federal tax credits conditioned on specific state unemployment insurance programs); *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127 (1947) (federal highway funds conditioned on compliance with the Hatch Act); *King* v. *Smith*, 392 U. S. 309 (1968) and *Rosada* v. *Wyman*, 397 U. S. 397 (1970) (federal funds conditioned on compliance with AFDC standards); *Lau* v. *Nichols*, 414 U. S. 563 (1974) (federal financial assistance conditioned upon compliance with Title VI of the Civil Rights Act); *Harris* v. *McRae*, 448 U. S. 297 (1980) (limitations on state use of federal Medicaid money to fund abortions); *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980) (federal funds for local public works conditioned on participation of minority contractors).

the requirements of the federal grant.[7] Upon condition that it abide by the terms of the Act, Kentucky receives federal money for every handicapped child in the State who receives special services. *See,* 20 U.S.C. §1411.

The standard for determining state obligations in federal grant-in-aid programs was recently articulated in *Pennhurst State Sch. and Hospital* v. *Halderman,* 451 U. S. 1 (1981). There the Court set forth the appropriate analysis for determining whether a program mandated specific obligations by the State or merely encouraged such activities:

> Turning to Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. . . . Legislation enacted pursuant to the spending

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[7]Since 1971, the federal government has provided grants to states under Part B of the Education for All Handicapped Children Act, 20 U.S.C. §§1411-1420, *as amended,* to assist state and local school districts in initiating, expanding, and improving special education programs for children. Federal involvement in funding of special education programs expanded considerably when authorization for funding under Part B was increased for fiscal year 1975 so that the states could "identify, locate, and evaluate all handicapped children, establish a policy of providing full educational opportunities for all handicapped children, and . . . establish a timetable" for accomplishing federal goals. 1975 U. S. Code Cong. & Ad. News 1425, 1429-30. Part B also provided procedural protections for handicapped children. The 1974 legislation incorporated many of the decisions set forth in earlier landmark litigation, particularly *Pennsylvania Association for Retarded Children (PARC)* v. *Commonwealth of Pennsylvania,* 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and *Mills* v. *Board of Education of the District of Columbia,* 348 F. Supp. 866 (D.D.C. 1972).

> power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract."

Id., at 17 (citations omitted). A state will be deemed to have made a knowing acceptance where Congress has spoken clearly about its requirements. *See Steward Machine Co.*, 301 U. S. 548, 585-598 (1937).

Applying such an analysis, it is clear that the respondents in this case voluntarily and knowingly accepted the grant conditions imposed under the Act and were therefore bound by its terms. *See* Petition, *supra*, 7-13. Although the *Tilton* Court found the Act to establish a typical grant-in-aid program with funding conditioned on "compliance with specific procedures," App. at 21, the Court failed to apply the *Pennhurst* analysis and thus failed to hold the Act's requirements mandatory. In contrast, the Fifth Circuit in *Crawford* v. *Pittman*, 708 F. 2d 1028 (5th Cir. 1983), applied *Pennhurst* and reached the inescapable conclusion that the requirements of the Act are mandatory.

Congress has every right to "fix the terms on which it shall disburse federal money to the states," *Pennhurst*, 451 U. S. at 17, and to demand compliance. In enacting this legislation, Congress clearly intended compliance with the articulated procedures of the Act. Under this Act, Congress appropriated money for use only by those states which would comply with the pro-

cedural requirements of the Act. The *Tilton* decision allows the respondents to receive federal money without meeting these requirements and thus voids the conditions articulated by Congress. This is an impermissible infringement by the Courts on the Spending Power of Congress.

"When [federal] money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states." *Helvering* v. *Davis,* 301 U. S. 619, 645 (1937). Long acknowledged as an important component of our free enterprise system, the right to contract cannot be denied to either the federal or State governments. The State and local respondents accepted substantial federal moneys in return for complying with the clearly defined conditions of the Act. Under *Pennhurst,* Congress has the right and duty to exact these conditions. To allow the respondents to avoid the terms of this contract seriously undermines the balance of our federal system.

CONCLUSION

The questions presented by this petition are of extreme importance to handicapped children. The decision of the Sixth Circuit in *Tilton* v. *Jefferson County Bd. of Educ.* permits States, solely on the basis of economic considerations, to deprive handicapped children of the procedural rights guaranteed to them by the Education for All Handicapped Children Act. The *Tilton* decision impermissibly infringes upon the power of Congress to determine the conditions which should be imposed upon the States in exchange for the receipt of federal moneys.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GENEVA FAYE PARRIS*
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Counsel wish to gratefully acknowledge the assistance with this Petition of Peter G. Glubiak, Law Clerk, and Lissa Rickard.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 81-5449

TIMOTHY TILTON, by his Guardian and Next Friend, MONA RICHARDS, et al., - *Plaintiffs-Appellants,*

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al., - - - - - - *Defendants-Appellees.*

ON APPEAL from the United States District Court for the Western District of Kentucky

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JUDGMENT—Filed April 19, 1983

Before: KENNEDY and KRUPANSKY, Circuit Judges; and RUBIN, District Judge.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

No. 81-5449

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TIMOTHY TILTON, by his Guardian and Next Friend, MONA RICHARDS, et al., - *Plaintiffs-Appellants,*

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al., - - - - - - *Defendants-Appellees.*

ON APPEAL from the United States District Court for the Western District of Kentucky

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OPINION—Decided and Filed April 19, 1983

Before: KENNEDY and KRUPANSKY, Circuit Judges and RUBIN, District Judge.*

RUBIN, District Judge. Plaintiffs, minors suing by their next friend, seek reversal of a District Court Order which denied a Motion for Preliminary Injunction. All plaintiffs are emotionally handicapped children who had received treatment and education at Jewel Manor, a day treatment facility, operated by the Kentucky Department of Human Resources ("DHR").

Jewel Manor provided the only 12-month day treatment program for seriously emotionally handicapped children available in the Jefferson County public schools. It featured a parental involvement and counseling program and

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*The Honorable Carl B. Rubin, Chief Judge of the United States District Court for the Southern District of Ohio, sitting by designation.

a special education/therapy program coordinated by specially-trained teachers.

In May of 1981, DHR closed Jewel Manor for budgetary reasons. Plaintiff sought the Preliminary Injunction to compel the DHR, the Jefferson County Board of Education ("County Board") and the Kentucky Department of Education ("DOE") to continue the operations of Jewel Manor.

At issue herein is an interpretation of The Education for All Handicapped Children Act ("EHCA" or "the Act"), 20 U.S.C. § 1400 *et seq.* passed by Congress in 1975.[1]

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[1]Appellants have offered no basis to sustain their action under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, 42 U.S.C. § 1983, or KRS §§ 157.200 to 157.305.
Plaintiffs-appellants assert that the termination of the program at Jewel Manor coinstituted a change in placement under the Act and, pursuant to § 1415(e)(3), the state was precluded from instituting this change during the pendency of proceedings contesting the propriety of its actions. Consequently, appellants seek an order directing defendants to reopen Jewel Manor or, alternatively, provide services substantially similar to those previously available at Jewel Manor, until final resolution of their complaints under the Act.

I.

The EHCA provides federal money to assist state and local agencies in educating handicapped children. Such funding is conditioned upon a compliance with specific procedures designed to assure "all handicapped children the right to a free, appropriate public education." 20 U.S.C. § 1412(1). Specifically, 20 U.S.C. § 1415 requires the states to adopt and maintain, *inter alia*, the following procedures:

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provisions of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

If the due process hearing is conducted by a local agency then the parent or guardian may appeal an adverse decision to the state agency. § 1415(c). Any party aggrieved by a final agency decision may initiate a civil action "with respect to the complaint presented." § 1415(e)(2). Finally, and most pertinent to the instant matter, subsection (e)(3) of § 1415 provides, in relevant part:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child.

II.

Initially, defendants contend that the assignment of children to Jewel Manor was not an "educational placement" within the meaning of the Act. They argue that Jewel Manor was a treatment facility only, and therefore outside the scope of the Act. This argument is without merit.

The term "educational placement" is not defined in the Act; however, "free appropriate public education" is defined as "special education and related services" which meet certain requirements set out in the statute. 20 U.S.C. § 1401(18). "Special education" refers to "specially designed instruction . . . to meet the unique needs of a handicapped child." 20 U.S.C. § 1401(16). "Related services" includes "such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education. . . ." 20 U.S.C. § 1401(17).

In light of these definitions, defendants' attempt to characterize the program at Jewel Manor as "treatment," rather than "education," must fail. The concept of education under the Act clearly embodies both academic instruction and a broad range of associated services traditionally grouped under the general rubric of "treatment," Any attempt to distinguish academics from treatment when defining "educational placement" runs counter to the clear language of the Act. There can be no question that plaintiffs' assignment to Jewel Manor was an educational placement within the meaning of the Act. *See e.g., Krulle*

v. *New Castle County School District*, 642 F. 2d 687, 693 (3rd Cir. 1981) (holding that a residential placement is encompassed within the term "special education"). *See also, Takarcik* v. *Forest Hills School District*, 665 F. 2d 443 (3rd Cir. 1981), *cert. denied*, 102 S. Ct. 3508 (1982) (catheterization is a "related service"); *Tatro* v. *State of Texas*, 625 F. 2d 557 (5th Cir. 1980) (same).

Defendants next assert that, even if the Jewel Manor program was subject to the EHCA, the closing of the school and reassignment of the plaintiffs was not a change in placement. Defendants principally rely on *Concerned Parents & Citizens for the Continuing Education of Malcolm X. (PS79)* v. *New York City Board of Ed.*, 629 F. 2d 751 (2nd Cir. 1980), *cert. denied*, 449 U. S. 1078 (1981). In that case, one school, P.S. 79, was closed for budgetary reasons, and the 185 handicapped children enrolled there, out of a total enrollment of 310, were moved to different schools which did not provide the "extremely innovative educational program" available at P.S. 79. The District Court found this to be a change in educational placement under the Act. In reversing, the Second Circuit stated that "the term 'educational placement' refers only to the general type of educational program in which the child is placed." 629 F. 2d at 753. The Court stated that the requirements of § 1415 would not be triggered by a decision to transfer the special educational classes from one school to another, even if the new programs varied somewhat from the old. *Id.* at 753-54. Special education refers to the general program and not variations within it. *Id.* The Court noted that the language of § 1415(b)(1)(c), *supra*, suggested that the requirements of § 1415 were limited to "certain fundamental decisions regarding . . . the most appropriate type of educational program for assisting a child with . . . a handicap." *Id.* The Court also stated that the applicable regulations supported this interpretation, and gave as an

example of a fundamental change the transfer of a child from a special class in a regular school to a special school. *Id.* The Court noted that defining a change in placement to include any alterations in a program "would virtually cripple the Board's ability to implement even minor discretionary changes within the eduactional programs provided for its students" and would also inhibit the Board from introducing new activities or programs. *Id.* at 775. The Court, in concluding that no change in placement had occurred, stated, "More explicit statutory language is required to justify an interpretation that would so constrain the discretion of educational agencies. . . ." *Id.*

The situation in the instant case is distinguishable. The evidence below tended to demonstrate that the programs at alternate schools are not comparable to the Jewel Manor program. Most significantly, all of the alternate placements were limited to 180-day programs whereas Jewel Manor provided year-round instruction. *See generally, Battle* v. *Commonwealth of Pennsylvania,* 629 F. 2d 269 (3rd Cir. 1980), *cert. denied,* 452 U. S. 968 (1981) (inflexible 180-day rule precludes the proper formulation of appropriate education). Testimony indicated that summer instruction was a significant facet of the Jewel Manor program. Accordingly, we conclude that the closing of Jewel Manor and transfer of these plaintiffs was a change in placement under the EHCA.

It does not, however, necessarily follow that the District Court erred in refusing to enjoin the closing of Jewel Manor, even though, in the usual case, a change in placement cannot take place absent the procedural protections of § 1415, including the requirement imposed by § 1415(e)(3) that the child remain in his or her "current educational placement" during the pendency of any proceedings initiated pursuant to § 1415. *See Kaelin* v. *Grubbs,* 682 F. 2d 595 (6th Cir. 1982). The procedural protections of § 1415

are designed to provide for maximum participation by the parents or guardians of handicapped children in the decisions concerning placement of handicapped children.[2] These procedures were established as a result of a Congressional concern that children were suffering from erroneous identification and classification of handicapping impediments. *See,* S.Rep. No. 94-168, 94th Cong., 1st Sess. [1975], U. S. Code Cong. & Admin. News 1450-51. *See also, Concerned Parents, supra,* at 754. Because of its belief that erroneous classifications were widespread, Congress determined that the interests of the handicapped child would best be served by imposing the status quo upon placement pending the resolution of any parental complaints prompted by a proposed change in placement. However, nothing in the legislative history or the language of the Act implies a legislative intent to permit interested parties to utilize the automatic injunctive procedure of § 1415 (e)(3) to frustrate the fiscal policy of participating states.

It is well-settled that "[b]y and large, public education in our Nation is committed to the control of state and local authorities." *Epperson* v. *Arkansas,* 393 U. S. 97, 100 (1968). These authorities do not, by electing to receive funds under the EHCA, abdicate their control of the fiscal decisions of their school systems. Stated in the alternative, Congress did not compel, as the price for federal participation in education for the handicapped, a wholesale transfer of authority over the allocation of educational resources from the duly elected or appointed state and local boards to the parents of individual handicapped children.

Clerly, however, applying the statutory injunction of § 1415(e)(3) to changes in placement occasioned solely by

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[2]As the Supreme Court noted, this provision is part of the Congressional scheme to encourage parental involvement in the education of handicapped children. *Board of Education* v. *Rowley,* __ U. S. __, 102 S. Ct. 3034, 3033 n.6 (1982).

economic decisions would effect a transfer of power. The appellants could forestall implementation of a fiscal policy decision while pursuing complaints through the procedural framework of § 1415. The exhaustion of administrative remedies coupled with available judicial review contemplated by § 1415 could conceivably entail several years of protracted litigation. During this period, were the Court to accept appellants' position, the state would be obliged to finance a program it had determined to be unaffordable simply because concerned parents or guardians alleged deficiencies in substitute programs. Congress certainly never intended such a result.

Moverover, the appellants' position could undermine the statutory purpose of providing an appropriate education to *all* handicapped children. As indicated, the state could be obligated, against its reasoned judgment, to finance a program for some handicapped children because of the bare allegations of a single interested party. This forced spending might well deprive other handicapped children of needed resources.

Finally, our conclusion that § 1415(e)(3) cannot be invoked to foreclose a change in placement arising solely as a result of economic considerations does not necessarily leave appellants without an adequate remedy to contest the sufficiency of the new placements. Appellants may initiate complaints "with respect to any matter relating to the . . . educational placement" of the children pursuant to §1415(b)(1)(E) and they are insured due process regarding any complaints by virtue of § 1415(b)(2).

We are supported in our conclusion by the Supreme Court's recent decision in *Board of Education* v. *Rowley*, ____ U. S. ____ (1982) (No. 80-1002 June 28, 1982). In *Rowley*, the Court indicated that, despite the broad range of services *permitted* under the Act's definition of "free appropriate public education," there are limits on which a

state is *required* to provide. In rejecting the argument that the states were required to "maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children," the Court stated that Congress was primarily concerned with identifying and evaluating handicapped children and providing them with access to a free public education. Slip op. at 23. The Court held that the requirement of a free appropriate education was satisfied by providing "persnalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 26. The Court went on to caution that courts must avoid imposing their views of preferable educational methods on the states, where responsibility, under the Act, for choosing the method most suitable to the child's needs was vested. *Id.* at 30.

We hold, then, that if a state or local agency must discontinue a program or close a facility for purely budgetary reasons, the requirements of 20 U.S.C. § 1415(e)(3) do not apply. The Judgment of the District Court is AFFIRMED.

APPENDIX B

No. 81-5449

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TIMOTHY TILTON, By His Guardian and Next Friend, MONA RICHARDS, Et Al. - *Plaintiffs/Appellants*

v.

JEFFERSON COUNTY BOARD OF EDUCATION, Et Al. - - - - - *Defendants/Appellees*

ORDER DENYING PETITION FOR REHEARING—
Filed August 1, 1983

Before: KENNEDY and KRUPANSKY, Circuit Judges; and RUBIN,* District Judge.

The Court not having favored rehearing en banc in the above case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman, Clerk

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*Honorable Carl B. Rubin, Chief Judge of the United States District Court for the Southern District of Ohio, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 81-0314-L(B)

TIMOTHY TILTON, Et Al. - - - - *Plaintiffs*

v.

JEFFERSON COUNTY SCHOOL BOARD, Et Al. - *Defendants*

ORDER—Entered June 5, 1981

For the reasons set forth in the Memorandum filed this date,

IT IS ORDERED that the motion of the plaintiffs, Timothy Tilton, a minor, by his legal guardian and next friend, Mona Richards; Robert McDaniel, a minor, by his legal guardian and next friend, Anita McDaniel; Delshawn Morris, a minor, by his legal guardian and next friend, Regina Morris, for a preliminary injunction against the defendants, Jefferson County Board of Education; Scott Detrick; Lyman Johnson; Anthony Gamboa; Michael W. Wooden; William Stites; James Hearn; C. B. Young, Jr.; David De Ruzzo, Reginald Green; David Weber; Kentucky Department of Education; Raymond Barber; Billie Downing; Sharon Embry; Department of Human Resources; Grady Stumbo, be and it hereby is denied and this action is dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable Order.

This 5th day of June, 1981.

/s/ Thomas A. Ballantine, Jr.
United States District Judge

Copies to:
Counsel of record

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 81-0314-L(B)

TIMOTHY TILTON, Et Al. - - - - *Plaintiffs*

v.

JEFFERSON COUNTY SCHOOL BOARD, Et Al. - *Defendants*

MEMORANDUM—Entered June 5, 1981

This motion for preliminary injunction was heard by the Court on June 3 and June 4, 1981. At the conclusion of plaintiffs' evidence the Court granted defendants' motion to deny the motion for preliminary injunction.

Plaintiffs, who bring this action by their parents or guardians, are emotionally disturbed children who have been receiving treatment at Jewell Manor, a facility until recently operated by defendant, Department for Human Resources. Fiscal policy led to a decision by DHR to close Jewell Manor and this action was instituted seeking to compel DHR to continue the operation of Jewell Manor. The Court's jurisdiction is invoked under the Education of Handicapped Act, Title 20 U.S.C. Section 1401 et seq.

The standards to be considered in granting or withholding injunctive relief are articulated in *Mason County Medical Association* v. *Knebel,* 563 F. 2d 256 (6th Cir. 1977):

> "In determining on appeal whether the District Court abused its discretion in granting or withholding preliminary injunctive relief, this Court has set forth four standards which must be considered:

1) Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;
2) Whether the plaintiffs have shown irreparable injury;
3) Whether the issuance of a preliminary injunction would cause substantial harm to others;
4) Whether the public interest would be served by issuing a preliminary injunction.

(Citations omitted.)[4]

We conclude that plaintiffs have not sustained the burden imposed upon them by the first standard.

Plaintiffs' evidence showed that Jewell Manor is a restrictive facility, the primary purpose of which is the treatment of emotionally disturbed children. Its goal is to improve the children to a point at which they are able to cope with the educational process. Concomitant with the treatment, the youngsters receive schooling from teachers employed by the defendant, Jefferson County Board of Education.

The evidence introduced by plaintiffs established that Jewell Manor's program was a highly desirable form of therapy and one which the parents or guardians wanted

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[4]In these two decisions, *Ohio* v. *Callaway, supra* [497 F. 2d 1235, 1241 (6th Cir. 1975)], and *SEC* v. *Senex Corp., supra* [534 F. 2d 1240, 1241 (6th Cir. 1976)], this Court used unfortunate terminology when it stated that one of the four standards or prerequisites for the equitable relief of a preliminary injunction is that there must be a 'possibility' of success on the merits. A showing of a mere 'possibility' of success would render the test for a preliminary injunction virtually meaningless. Therefore, we reiterate that the plaintiffs must demonstrate a strong or substantial *likelihood* or *probability* of success on the merits." (Emphasis in original.) 563 F. 2d at 261.

continued. A psychologist, Dr. Richard Johnson, testified that it would be "nice" if the operation of Jewell Manor could be continued. The personnel of Jewell Manor who testified concluded that, from a mental health standpoint, Jewell Manor was perferable to other programs available.

Plaintiffs' evidence did not establish in any degree that the educational program offered by the defendant Board of Education is inappropriate. Title 20 U.S.C. Section 1412(1) requires, "The state [to have] in effect a policy that assures all handicapped children the right to a free appropriate public education." There simply is no evidence that the programs offered by defendants fail to meet this standard, and plaintiffs' motion for preliminary injunction will be denied and this action will be dismissed.

An appropriate Order has been entered this 5th day of June, 1981.

/s/ Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C81-0314-L(B)

TIMOTHY TILTON, a minor, by his legal guardian and next friend, MONA RICHARDS;

ROBERT MCDANIEL, a minor, by his parent and next friend, ANITA MCDANIEL;

DEL SHAWN MORRIS, a minor, by his parent and next friend; REGINA MORRIS;

By themselves and on behalf of all others similarly situated, - - - - - - - - - *Plaintiffs*

v.

JEFFERSON COUNTY BOARD OF EDUCATION; SCOTT DEITRICK, LYMAN JOHNSON, ANTHONY GAMBOA, MICHAEL W. WOODEN, WILLIAM STITES, JAMES, HEARN, C. B. YOUNG, JR., individually and in their official capacity as members of the Jefferson County Board of Education; DAVID DERUZZO, individually and in his official capacity as Superintendent of the Jefferson County Schools; REGINALD GREEN, individually and in his official capacity as Director of School Programs in Jefferson County; DAVID WEBER, individually and in his official capacity as Director of Special Education in Jefferson County;

KENTUCKY DEPARTMENT OF EDUCATION; RAYMOND BARBER, individually and in his official capacity as Superintendent of Public Instruction for the Kentucky Department of Education; BILLIE DOWNING, individually and in her official capacity as Head of the Bureau of Exceptional Children in the Kentucky Department of Education; SHARON EMBRY,

individually and in her official capacity as Coordinator for Non-Public School Programs in the Kentucky Department of Education;

DEPARTMENT OF HUMAN RESOURCES; GRADY STUMBO, individually and in his official capacity as Director of the Department of Human Resources in the State of Kentucky, - - - - - *Defendants*

COMPLAINT—Filed May 2, 1981

I

PRELIMINARY STATEMENT

1. This is a civil action for injunctive and declaratory relief to redress violations of rights secured to plaintiffs by the Constitution and laws of the United States. Plaintiffs and the class they represent are seriously emotionally handicapped children residing in the jurisdiction of the Jefferson County School District, who are being denied a free and appropriate public education by the defendants. Plaintiffs, on behalf of themselves and other similarly situated, bring this action to challenge defendants' educational policies as discriminatory against them as handicapped children, and as arbitrary and excessive violations of rights to substantive and procedural due process. This action arises under 42 U.S.C. §1983 and seeks to redress the violation of plaintiffs' rights under color of state and local law, regulations, policies, custom or usage or rights of privileges and immunities secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States. This action further arises under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Education of the Handicapped Act, 20 U.S.C. §1401, *et seq.*, as amended by the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1402,

et seq., and seeks to redress the denial of the right of handicapped students to a free and appropriate public education. This action also rises under pendent state law claims arising under KRS 157.200 to 157.305 and the Kentucky constitution.

II

JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. §1343(3) and (4), providing for original jurisdiction of this Court in suits authorized by 42 U.S.C. §1983; by 20 U.S.C. §1415(4), providing for original jurisdiction of this Court in suits arising under 20 U.S.C. §1401, *et seq.*, and/or by 28 U.S.C. §1331, in that the matter arises under the Constitution and laws of the United States. Plaintiffs also invoke the pendent state jurisdiction of this Court. Plaintiffs' request for declaratory and injunctive relief is authorized by 28 U.S.C. §2201 and §2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure.

III

CLASS ACTION ALLEGATIONS

3. Plaintiffs bring this action in their own behalf and on behalf of other persons similarly situated, pursuant to 23(a)(b)(2) of the Federal Rules of Civil Procedure. The plaintiffs represent a class and subclass, to wit:

(a) all handicapped students who have been, are presently, or who will be subjected to the educational policies and procedures complained of by plaintiffs and utilized by the defendants; and

(b) all the handicapped students at Jewel Manor Day Treatment Center, who, solely because of their handicap, are presently, have been and/or will be,

> denied a free and appropriate public education because of the policies, practices and procedures utilized by defendants. Upon information and belief, the number in this class is approximately 49 students currently attending Jewel Manor.

The members of the class and subclass on whose behalf plaintiffs sue are so numerous as to make it impracticable to bring them all individually before this Court. There are common questions of law and fact involved and plaintiffs' claims are typical of the claims of this entire class and subclass. Plaintiffs will fairly and adequately represent, and will vigorously protect, the interests of each class and subclass. The claims presented by the Plaintiffs are capable of repetition, yet evading review, and in this case the constant existence of a class of persons suffering the deprivation is certain. Defendants have acted on grounds generally applicable to each class plaintiffs represented, thereby making appropriate injunctive relief and declaratory relief with respect to the class and subclass as a whole.

IV

PARTIES

4. Plaintiff TIMOTHY TILTON is a seriously emotionally handicapped child, age eight (8), who, by his legal guardian and next friend, MONA RICHARDS, brings this action on his own behalf and on behalf of others similarly situated. Plaintiff resides at 4107 Seawave Court in Jefferson County. He is currently attending Jewel Manor Day Treatment Center, a program operated by the Department of Human Resources in conjunction with the Jefferson County Board of Education in the 1980-81 school year.

5. Plaintiff ROBERT MCDANIEL is a seriously emotionally handicapped child, age ten (10) who by his parent and next friend, ANITA MCDANIEL, brings this action on his own

behalf and on behalf of other similarly situated. Plaintiff resides at 10012 West Avenue in Jefferson County, Kentucky, in the Jefferson County school district. Robert is currently attending Jewel Manor Day Treatment Center, a program operated by the Department of Human Resources in conjunction with the Jefferson County Board of Education during the 1980-81 school year.

6. Plaintiff DEL SHAWN MORRIS is a seriously emotionally handicapped child, age nine (9), who by his parent and next friend, REGINA MORRIS, brings this action on his own behalf and on behalf of others similarly situated. Plaintiff resides at 619J Rose Lane in Jefferson County, Kentucky, within the Jefferson County school district. Del Shawn is currently attending Jewel Manor Day Treatment Center, a program operated by the Department of Human Resources in conjunction with the Jefferson County Board of Education during the 1980-81 school year.

7. Defendant JEFFERSON COUNTY BOARD OF EDUCATION is a local education agency as defined in 20 U.S.C. §1401(8) charged with the responsibility of operating the public school system in Jefferson County, and as part of that responsibility, establishes all policy, including policies and procedures affecting the education of all handicapped children within Jefferson County. SCOTT DETRICK, LYMAN JOHNSON, ANTHONY GAMBOA, MICHAEL W. WOODEN, WILLIAM STITES, JAMES HEARN, and C. B. YOUNG, JR., who are sued individually and in their official capacities, are publicly elected members of the Jefferson County Board of Education and are intrusted with the management and control of all matters relating to the operation of the Jefferson County Public School System. Defendants DR. DAVID DERUZZO, REGINALD GREEN, and DAVID WEBER, who are sued individually and in their official capacities, are all employed by the Jefferson County Board of Education and act as agents of that Board and in their respective capacities, have full

responsibility for the unlawful decisions and actions challenged by the plaintiffs herein. Any and all successors in interest to those defendants named in their individual and official capacities are herein also named as defendants.

8. Defendant, Dr. David DeRuzzo, who is sued individually and in his official capacity, is and was at all times material hereto the acting Superintendent of the Jefferson County Board of Education and is the executive and chief administrative officer of the Jefferson County Board of Education, and is ultimately responsible for all administrative decisions made within the school district, including the policies affecting handicapped children, and decisions relating to their placement in educational programs.

9. Defendant Dr. Reginald Green, who is sued individually and in his official capacity, is and was at all times material hereto the Director of the Department of School Programs for the Jefferson County Board of Education. In that capacity, he shares responsibility for the administration of educational policies and procedures as they apply to handicapped students and school programs offered to them throughout the Jefferson County Board of Education school system.

10. Defendant David Weber, who is sued individually and in his official capacity, is and was at all times material hereto the Director of the Special Education Program in Jefferson County. In that capacity, he shares responsibility for the administration of policies and procedures as they apply to handicapped students throughout the Jefferson County Board of Education school system.

11. Defendant Kentucky Department of Education is the state educational agency as defined in 20 U.S.C. §1401(7) that is charged with the responsibility of operating the public school systems within the state of Kentucky, and as part of that responsibility, establishes and monitors all policies and procedures affecting the education of handi-

capped children in the state of Kentucky. Defendants RAYMOND BARBER, BILLIE DOWNING, and SHARON EMBRY, who are sued individually and in their official capacities, are all employed by the Kentucky Department of Education and act as agents of that Department and in their respective capacities have full responsibility for the unlawful decisions and actions challenged by the plaintiffs herein.

12. Defendant RAYMOND BARBER, who is sued individually and in his official capacity, is a publicly elected official and as Superintendent of Public Instruction in the state of Kentucky is the executive and chief administrative officer of the state Department of Education, and is ultimately responsible for all administrative decisions made within the state, including policies affecting handicapped children, and decisions affecting the educational placement of the children.

13. Defendant BILLIE DOWNING, who is sued individually and in her official capacity, is the Head of the Bureau of Education for Exceptional Children in the Kentucky Department of Education, and in this capacity is responsible for coordinating, directing and monitoring the state's educational programs for exceptional schoolage children.

14. Defendant SHARON EMBRY, who is sued individually and in her official capacity, is Coordinator of the Non-Public School Programs for the state of Kentucky and in this capacity is responsible for coordinating, directing and monitoring the state's educational programs for emotionally handicapped school-age children in non-public school programs.

15. Defendant DEPARTMENT OF HUMAN RESOURCES, a public agency, which in the case of the administration of the program at Jewel Manor School has entered into a contractual relationship with the local Jefferson County Board of Education to provide educational and related services to emotionally handicapped children age seven (7) to twelve

(12) who are enrolled in the Jewel Manor Day Treatment Center.

16. Defendant GRADY STUMBO, sued individually and in his official capacity as Director of the Department of Human Resources in the state of Kentucky, is in this capacity the executive and chief administrative officer of the Department of Human Resources, and is ultimately responsible for all decisions made within the agency, including policies and procedures affecting handicapped children participating in the Department's current programs.

17. Each of the above defendants, sued in their official capacities, include all successors in interest to the named defendants.

18. Each of the named individual defendants are acting under color of state law.

V

FACTUAL ALLEGATIONS

19. Jewel Manor is a day treatment facility in Jefferson County operated for seriously emotionally handicapped children between the ages of seven through twelve years.

20. Upon information and belief, the Department of Human Resources and the Jefferson County Board of Education have entered into a contractual relationship for providing educational and related services to children attending the Jewel Manor program.

21. The educational and treatment aspects of the program at Jewel Manor operate on a 12-month, year-round basis.

22. Counseling services are offered to the children, individually and with their parents, as a "related service" as defined in 20 U.S.C. §1401(17) that enables the children to fully benefit from their academic program.

23. Upon information and belief, it is customary for a child at Jewel Manor to be periodically evaluated at a conference with Jewel Manor staff members and with parents, for the purpose of determining whether the educational and emotional progress of the child is sufficient to allow him/her to be appropriately placed in a classroom environment in the Jefferson County School System.

24. Upon information and belief, the average time period for a child to attend the Jewel Manor program is 18 to 24 months.

25. Upon information and belief, there are currently 49 students attending the Jewel Manor program, 13 of which have been involuntarily committed to the state.

26. On or about May 5, 1981, the parents of students attending Jewel Manor received notice that the program at Jewel Manor would be permanently closed as of May 29, 1981.

27. The defendants have not offered suitable equivalent educational placements (including a year-round program with counseling services offered to students and parents) to plaintiffs.

28. The placement alternatives offered by the defendants to plaintiffs are inappropriate and of less educational quality and will not allow the children to fully benefit from their education, as it will not include the services currently available to the plaintiffs at Jewel Manor.

29. The plaintiffs, who are seriously emotionally handicapped children, will suffer irreparable emotional and educational harm by the sudden disruption of their treatment and education program and subsequent change in placement.

30. Named plaintiffs, on behalf of their children, and, upon information and belief, parents of other students in the class and subclass that plaintiffs represent, are currently appealing the change in educational placement and

alternative programs offered by the defendants through administrative conferences and hearings. The parents will not, however, be able to complete the administrative appeal process before the date indicated by defendants upon which Jewel Manor will be closed.

31. The defendants receive federal funds to operate the program at Jewel Manor and to operate the public school program in Jefferson County.

VI

FIRST CAUSE OF ACTION

32. The acts and omissions of the defendants alleged herein violate the plaintiffs' rights under the Education for the Handicapped Act, 20 U.S.C. §1401, *et seq.* (as amended by the Education of All Handicapped Children Act of 1975, 20 U.S.C. §1402, *et seq.*), to a free appropriate public education, and under the regulations promulgated thereunder 34 C.F.R. 104, *et seq.*

VII

SECOND CAUSE OF ACTION

33. The actions of the defendants alleged herein discriminate against the plaintiffs solely and on the basis of their handicap in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the regulations promulgated thereunder, 34 C.F.R. Part 104, *et seq.*

VIII

THIRD CAUSE OF ACTION

34. The acts and omissions of the defendants violate plaintiffs' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

IX

FOURTH CAUSE OF ACTION

35. The acts and omissions of the defendants violate plaintiffs' rights under the Constitution of the Commonwealth of Kentucky and the laws of Kentucky as promulgated in KRS 157.200-157.305.

X

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray this Court:

A. Issue a temporary restraining order and subsequent preliminary injunctions requiring defendants to develop a plan which specifies and meets plaintiffs' needs and services required to meet those needs; that defendants thereupon provide directly, or arrange and contract for provision of, appropriate educational services for plaintiffs without cost; and that Jewel Manor remain open to plaintiffs either permanently or until such time as a new suitable equivalent program is available to plaintiffs without cost to them.

B. Issue a declaratory judgment that plaintiffs have a right to free appropriate public education and that defendants have a legal responsibility to locate and provide such services as will enable plaintiffs to benefit from their educational programs.

C. After due proceedings, permanently enjoin defendants from refusing to afford plaintiffs with suitable educational services, at Jewel Manor or other equivalent and appropriate educational placements, and from otherwise discriminating against them on account of their handicaps.

D. Order defendants to pay all costs, including reasonable attorneys' fees.

E. Order such other and further relief as this Court may deem as just, proper and equitable.

Respectfully submitted,

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Attorney at Law

(s) Lloyd C. Anderson
Attorney at Law
Legal Aid Society, Inc.
425 West Muhammad Ali Blvd.
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Telephone: (502) 584-1254
Counsel for Plaintiffs

I hereby acknowledge that I have read the foregoing Complaint and swear that it is true to the best of my knowledge and belief under penalty of law.

(s) Mona Richards
Guardian of Timothy Tilton

I hereby acknowledge that I have read the foregoing Complaint and swear that it is true to the best of my knowledge and belief under penalty of law.

(s) Anita McDaniel
Mother of Robert McDaniel

I hereby acknowledge that I have read the foregoing Complaint and swear that it is true to the best of my knowledge and belief under penalty of law.

(s) Regina Morris
Mother of Del Shawn Morris

APPENDIX E

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. _____

TIMOTHY TILTON, Et Al., - - - - *Plaintiffs,*

v.

JEFFERSON COUNTY SCHOOL BOARD, Et Al. - *Defendants.*

AFFIDAVIT—Filed May 26, 1981

I, Mona Richards, being first duly sworn, depose and state:

1. Timothy Tilton was born on August 10, 1972. He is eight (8) years old, and is seriously emotionally handicapped, hyperactive with vision, speech, and hearing problems.

2. Timothy is my grandson and my husband, Elias Richards and I have legal custody of him.

3. Timothy lives with us at 4107 Seawave Court in Jefferson County, Kentucky, within the school district of the Jefferson County Board of Education.

4. At this time, Timothy is attending Jewel Manor, a day treatment center for emotionally handicapped children between the ages of seven and twelve.

5. Three years ago, I personally paid to have Timothy privately tested for his learning disability when it appeared Jefferson County Board of Education would not test him prior to his first year placement in the Jefferson County public schools.

6. After having him tested, Timothy was placed in a Learning Disability class at Filson Elementary School, where, except for a brief period, Timothy remained for almost two years.

7. His entire time at Filson, Timothy was in the lowest level of first grade. He made no progress. He did not learn to read or write at all in almost two years. He did not know his numbers. He could not count. He could not color. He was seriously misbehaving in his class at Filson and spent a great deal of time in the school office. Day after day, the staff at Filson would call me to come and get Timothy they could not cope with Timothy's behavior. Several times Timothy tried to run away from Filson after the bus delivered him to school.

8. Timothy's teacher at Filson informed me that the Learning Disability program at Filson Elementary School was not an appropriate placement for Timothy and would not be productive for him. (No other Jefferson County school program was suggested to me for Timothy, however.) I was informed by the staff at Filson Elementary School that they did not want Timothy to come back there.

9. My husband and I learned of Jewel Manor and without delay he was enrolled there and began in Jewel Manor's program in May, 1980. Jewel Manor is a year-round day treatment facility, so at this time, Timothy has participated in their program for twelve months. His improvement has been dramatic.

10. At Jewel Manor, Timothy has learned to read simple books, spell, do simple mathematics, and count. He can spell words he has never seen by sounding them out. He is interested in reading anything he can get his hands on. He reads road signs as we are driving.

11. Timothy's behavior is also improved immensely. The staff at Jewel Manor knows how to work with Timothy. They have developed a behavior chart for Timothy with

rewards for good behavior. Timothy is learning basic living skills so that now he gets along much better at home and at school. Now he likes to play with other children; he is no longer afraid of them. He can play simple games.

12. My husband and I have been told by a child psychiatrist that Jewel Manor is the best placement for Timothy and that he needs to remain there.

13. On May 5, 1981, I received a letter from Judy Repko, Superintendent of Jewel Manor Day Treatment Center, informing me that Jewel Manor will be closed on May 29, 1981. Timothy is aware that Jewel Manor is to be closed and it is upsetting him, causing an increase in his behavior problems.

14. I believe that irreparable harm and damage will be caused to Timothy if Jewel Manor is allowed to be closed. There will be no program for Timothy available since the Jefferson County Board of Education does not have one. I fear all his new progress will end and that he will regress both educationally and emotionally if he can no longer go to Jewel Manor.

15. I ask that this Court enter a Restraining Order to prevent Jewel Manor from being closed on May 29, 1981.

(s) Mona Richards, Affiant

Subscribed and sworn to before me by Mona Richards this 26th day of May, 1981.

My commission expires: December 20, 1983

(s) Mary Loretta Burwell
Notary Public
Ky. State at Large

APPENDIX F

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. _____

TIMOTHY TILTON, et al. - - - - *Plaintiffs,*

v.

JEFFERSON COUNTY SCHOOL BOARD, et al. - *Defendants.*

AFFIDAVIT—Filed May 26, 1981

Comes the Affiant, Anita McDaniel, being duly sworn and deposed, and states that she is the mother of Robert McDaniel, born September 3, 1970. She further states that Robert McDaniel is presently attending school at Jewel Manor.

My son attended Jefferson County public schools for approximately four years. Robert began first grade in a regular program at Lincoln Elementary. He was transferred to a special education program for children with behavior disorders at Lincoln Elementary and finished first, second and third grades in this program. Robert remained at the third grade level for two years, having been held back after his first year in third grade. My son then began the fourth grade at Lincoln Elemenary. In November of 1980, my family moved and Robert transferred to a fourth grade special education program at Stone Street Elementary. In March of 1981, Robert transferred to Jewel Manor, where he is presently functioning on a fourth grade level in mathematics and reading on approximately a sceond grade level.

I was told by a teacher at Stone Street Elementary that the program offered by that school was not able to adequately deal with Robert's behavioral disorders. Robert was at this time, in March of 1981, referred to Haywood Environmental School. I was told by members of the staff at this school that Robert would not benefit from the program at Haywood. He was then referred to Jewel Manor.

Since attending Jewel Manor in March of 1981, Robert has improved significantly. He has been able to receive counseling on a regular basis. The student teacher ratio is more advantageous at Jewel Manor, offering Robert the attention he needs in order to overcome his behavioral problems and to benefit from an academic program. In addition, Robert benefits from the continuity and structure offered by Jewel Manor's year-round program. He had not received this needed attention in the Jefferson County schools which he attended.

I received a letter on or around May 5, 1981, informing me that Jewel Manor was to be closed.

I believe that Robert would continue to make progress if allowed to remain at Jewel Manor. However, if Robert is at this time taken out of this program, I believe he will regress and that he will suffer emotionally and educationally as I know of no other program comparable to that at Jewel Manor.

(s) Anita McDaniel
Affiant

Subscribed and sworn to before me by Anita McDaniel this 26 day of May, 1981.

My commission expires: 4-9-83

(s) Catherine M. Ford
Notary Public
Ky. State at Large

APPENDIX G

STATUTORY PROVISIONS INVOLVED

The Education for All Handicapped Children Act, 20 U.S.C. §1401, *et seq.*, in particular:

20 U.S.C. §1412(5)

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

* * * * * * *

(5) The State has established (a) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

20 U.S.C. §1414(a)(7):

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

* * * * * * * *

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

20 U.S.C. §1415

PROCEDURAL SAFEGUARDS

Establishment and Maintenance

(a) Any State educational agency, any local educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provisions of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hear-

ing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transferred to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such

hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Pub. L. 91-230, Title VI, § 615, as added Pub. L. 94-142, § 5(a), Nove. 29, 1975, 89 Stat. 788.

APPENDIX H

Text of Response

(March 14, 1979)

You asked if a local school district is responsible for the cost of tuition, during a due process hearing on the appropriateness of that placement, when the parent has placed the child in a private school without prior agreement of the local school district. Parents may choose to send a child to a private school rather than take advantage of a free appropriate public education. If this happens, there is no requirement for the State or local educational agency to bear the cost of the private school tuition. In this situation the cost of tuition could not be considered the responsibility of the State or local educational agency under the provisions of the Part B regulations (121a.513) unless the public agency and the parents of the child agree. This agreement is unlikely in that the placement is the substance of the disagreement under consideration in the due process hearing.

On the other hand you also asked if a local school district is responsible for the cost of tuition, during a due process hearing, when a local school district has placed the child and a disagreement develops as to the continuation of such a placement. In this case the provisions of the Part B regulations (121a.513) shall apply. Therefore the local school district must continue the payment of tuition until all due process proceedings have been completed. This includes judicial proceedings as well. Exceptions may be taken to this provision if both the parents and the school district agree otherwise.

Payment for the cost of tuition during the pendency of a due process proceeding is not to be considered a retroactive payment based upon the success of a parent's com-

plaint in a due process proceeding when a child is placed by the State or local educational agency. The payment of the cost of tuition is to continue during a due process hearing if the local or State educational agency has placed the child.

William D. Tyrell, Chief
Policy Section
Bureau of the Education for
the Handicapped

PROOF OF SERVICE

We, Geneva Faye Parris and David Alan Friedman, the counsel of record for petitioners, having been admitted to practice before the Supreme Court of the United States, do hereby certify that three (3) copies of the foregoing Petition for a Writ of Certiorari were mailed, first class postage prepaid, to Martin Z. Kasdan, Jr., Cabinet for Human Resources, Office of the Counsel, 275 East Main Street—4 West, Frankfort, Kentucky 40621; Robert L. Chenoweth, Assistant Deputy Attorney General, Capitol Building, Frankfort, Kentucky 40601-3494; and Francis J. Mellen, Jr., Wyatt, Tarrant & Combs, Citizens Plaza, Louisville, Kentucky 40202, this 31 day of October, 1983.

Geneva Faye Parris (dsf)

GENEVA FAYE PARRIS

David Alan Friedman

DAVID ALAN FRIEDMAN

Office - Supreme Court, U.S.
FILED
NOV 30 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-781

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

TIMOTHY TILTON, Et Al. - - - Petitioners

versus

JEFFERSON COUNTY BOARD OF EDUCATION, Et Al. - - - - - Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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November 30, 1983

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-781

TIMOTHY TILTON, Et Al. - - - *Petitioner*

v.

JEFFERSON COUNTY BOARD OF EDUCATION, Et Al. - - - *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTRODUCTION

The Respondents[1] respectfully submit this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (the "Petition") filed on behalf of Timothy

---

[1]The Respondents named in the Petition are the three government agencies and the 14 individual officers and employees of those agencies who were named as Defendants in the Complaint [*See* Petition, App. D, pp. 34-35]. Each counsel for the respective Respondents represents one of the agency Respondents and the officers and employees of that Respondent. Since the time the Complaint was filed, eight of the 14 individuals named in the Complaint have been replaced by their duly elected or appointed successors. Additional changes in these offices and positions will probably occur before this Court reaches a decision on the Petition. Because the allegations of the Complaint are directed primarily toward the three agency respondents, counsel for the Respondents have not sought an order of substitution with respect to each new

(Footnote continued on following page)

Tilton, Robert McDaniel and Del Shawn Morris by their parents and guardians (the "Petitioners").[2]

COUNTERSTATEMENT OF THE CASE

The Respondents submit this counterstatement of the case to supply certain relevant facts omitted from, or insufficiently explained in, the Petition.

This is an action in which the Petitioners, the parents and guardians of three emotionally disturbed children (the "Children"), claimed that their and the Childrens' rights[3] were violated by the Kentucky Cabinet for Human Resources and its Secretary (collectively, "KCHR"), the Kentucky Department of Education, its Superintendent and certain of its employees (collectively, "KDOE"), and the Board of Education of Jefferson County, Kentucky, its Superintendent and certain of its employees (collectively,

---

(Footnote continued from preceding page)
officer and employee, and do not intend to do so in the future. See, Fed. R. Civ. P. 25(d).

[2]As of date this brief was printed, counsel for the Petitioners have not notified the Respondents of the date of filing of the Petition and docket number of the case, as required by U. S. Supreme Court Rule 19.3.

[3]The Petitioners also claimed in the Complaint that they represented a class of similarly situated persons. Because the District Court properly dismissed the Complaint after the hearing on Petitioners' motion for preliminary injunction [*see, Bright* v. *Nunn*, 448 F. 2d 245, 247, n.1 (6th Cir. 1971)], the District Court did not reach the issue of class certification. *See, Garcia* v. *Rush-Presbyterian-St. Luke's Medical Center*, 80 F.R.D. 254, 260 (N.D. Ill. 1978). Contrary to the statements at page 5 of the Petition, the District Court denied the motion for temporary restraining order on May 28, 1981, and heard the motion for preliminary injunction on June 3 and 4, 1981.

the "Board").[4] The event which gave rise to this alleged violation of rights was KCHR's decision to close the Jewel Manor Day Treatment Center ("Jewel Manor"), a day residential facility funded and operated by KCHR in Jefferson County, Kentucky to provide treatment for children with behavioral disorders.

At the time the Complaint was filed, the Children were receiving treatment from KCHR at Jewel Manor on a daily basis. Because the Children were classified as "handicapped" under the Education of the Handicapped Act, 20 U.S.C. §1401 *et seq.*, as amended by the Education for All Handicapped Children Act of 1975, Pub. L. 94-142 (the "Act"), they were entitled by the Act to receive a "free appropriate public education" from the state of Kentucky. 20 U.S.C. §1412(1). Because the Children were present at Jewel Manor each day, they were unable to receive that education at any of the schools maintained by the Board. Therefore, KCHR, by contract with the Board, provided educational instruction to the Children and other residents of Jewel Manor[5] on the Jewel Manor prem-

[4]KCHR is a department of Kentucky state government with broad responsibilities in the area of health and social welfare. *See*, KRS 194.010. KDOE is a department of Kentucky state government with general supervisory authority over public education in Kentucky. *See*, KRS 156.010. The Board is a local board of education established under Kentucky law to provide public education in Jefferson County, Kentucky. *See*, KRS 160.160 and 160.290.

[5]The Petitioners' evidence in the District Court established that as of May, 1981, KCHR was providing treatment to 47 emotionally disturbed children at Jewel Manor, and that 18 of those children would not have been in day residence at Jewel Manor by the time the 1981-82 school year began because of improvement in their condition.

ises, as appropriate within the context of their treatment plans. The Board was reimbursed for these services from KDOE under KRS 158.135, a Kentucky statute that provides funding for school services provided by a local board of education to children in a state-operated day treatment center such as Jewel Manor.

Because the Children were in residence at Jewel Manor daily, the Individualized Educational Program ("IEP") prepared for each of the Children under 20 U.S.C. §1401(19) stated that they would be educated there. Jewel Manor was, however, a KCHR treatment facility, not an educational institution. The Petitioners' evidence in the District Court established that emotionally disturbed children were placed into KCHR's program at Jewel Manor primarily to deal with their behavioral problems, not to provide the education to which they were entitled under the Act. The District Court found that:

> Plaintiffs' evidence showed that Jewell [sic] Manor is a restrictive facility, the primary purpose of which is the treatment of emotionally disturbed children. Its goal is to improve the children to a point at which they are able to cope with the educational process. Concomitant with the treatment, the youngsters receive schooling from teachers employed by the defendant, the Jefferson County Board of Education [Petition, App. C, p. 32].

KCHR closed Jewel Manor for budgetary reasons on May 29, 1981. Because the Children would no longer receive daily treatment on the Jewel Manor

premises, the Board could provide specialized educational services to the Children during the 1981-82 school year in the programs for emotionally disturbed children conducted at the Board's own facilities. At conferences held under 20 U.S.C. §1401(19) prior to May 29, 1981, the Board proposed to the Petitioners new IEPs which provided that each of the Children would receive these services during that school year at one of these facilities.

Initially, the Petitioners rejected the Board's proposals for the 1981-1982 school year. In addition to filing this action under the Act[6] for a temporary restraining order and preliminary injunction to require KCHR to continue to operate Jewel Manor, the Petitioner Morris and two other parents demanded administrative hearings under 20 U.S.C. §1415(b)(2). Those hearings were not vigorously pursued by the parents. KDOE cancelled one of the hearings in July, 1981, at the request of the parents. KDOE notified the other parents in January, 1982, that it considered the remaining hearing requests to be cancelled, due to lack of response by the parents and their representatives to notices from KDOE. There have been no further contacts from these parents or their representatives, and

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[6]In their Complaint, the Petitioners also claimed violations of Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. §794], the Due Process and Equal Protection clauses of the United States Constitution, the Kentucky Constitution and various Kentucky statutes. On appeal to the Sixth Circuit, and in their Petition, the Petitioners have sought review only with respect to their alleged claims under the Act. *See*, footnote 1 to the Sixth Circuit's Opinion [Petition, App. A, p. 21].

there are no pending hearing requests from any other children who attended Jewel Manor prior to its closing [*See,* Affidavit of Billie Downing, App. A].

The Children attended special education programs at the Board's facilities during the 1981-82 school year. In 1982 and 1983, the Children received new IEPs for the 1982-83 and 1983-84 school years, and the Petitioners have not contested those IEPs. Robert McDaniel is currently attending a special education school operated by the Board, Timothy Tilton is attending special education classes in a regular school operated by the Board, and Del Shawn Morris is attending a combination of special and regular classes in a regular school operated by the Board. The Petitioner Morris has requested that Del Shawn's IEP be reviewed again in January, 1984, because she wants Del Shawn to attend only regular classes beginning January, 1984 if possible [*See,* Affidavits of Mildred Payne, Elaine Kasian and Edgar Dyer, Apps. B. C and D].

SUMMARY OF ARGUMENT

1. This case is moot because each of the three Petitioners has accepted without further protest the alternate special education program offered by the Board for the Children during the 1981-82 and 1982-83 school years, and in the absence of a certified class there is no issue capable of repetition that would otherwise evade review.

2. The decision of the Sixth Circuit is not in conflict with any decision of any other Federal Court of Appeals with respect to the questions presented by the Petition. Indeed, the decision of the Sixth Circuit

was recently followed by the Second Circuit in a similar case, *Fallis* v. *Ambach*, 710 F. 2d 49 (2nd Cir. 1983).

3. The decision of the Sixth Circuit is not in conflict with any decision of this Court. Indeed, the decision of the Sixth Circuit is completely consistent with this Court's only decision construing the Act, *Board of Education* v. *Rowley*, 458 U. S. 176 (1982). The Sixth Circuit correctly held in reliance on *Rowley*, as well as *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), that 20 U.S.C. §1415(e)(3) does not apply when a program is discontinued or a facility is closed for purely budgetary reasons.

ARGUMENT

I. This Case Is Moot.

It is a familiar proposition that "federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971). This Court hears only actual cases and controversies between adverse interests and does not review those cases which are moot. United States Constitution, Article III; *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920); *St. Pierre* v. *United States*, 319 U. S. 41, 42 (1943). A case becomes moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome". *Murphy* v. *Hunt*, 455 U. S. 478 (1982). When the controversy becomes academic by reason of changed circumstances, this Court's jurisdiction ceases. *Powell* v. *McCormack*, 395 U. S. 486, 496 (1969). *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974).

While this Court has recognized an exception to the general rule in cases that are "capable of repetition, yet evading review," this exception arises primarily in the narrow context of a class action suit. A class action may be permitted to proceed to adjudication on behalf of the class members even though the named plaintiff no longer retains a personal stake in the outcome. *See, Dunn* v. *Blumstein,* 405 U. S. 330 (1972). However, this Court has been quite firm in limiting this exception to suits brought in the form of a *properly certified* class action. In *DeFunis, supra,* in which the plaintiff challenged a law school minority admissions program as discriminatory and was admitted to the school during the pendency of the suit, this Court held that the plaintiff lacked the necessary adversarial posture to save the case from mootness. Significantly, this Court found it of great relevance that the plaintiff did not bring the case as a class action and, consequently, did not fit within the narrow "capable of repetition, yet evading review" exception. *DeFunis* at 319. *See also, Weinstein* v. *Bradford,* 423 U. S. 147 (1975) (plaintiff's claim against state parole board was rendered moot due to his intervening parole and the absence of a certified class in whose name the action could proceed).

A named plaintiff in a class action must show that the threat of injury in a case is real and immediate, not "conjectural" or "hypothetical." "Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of

himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). In *Sosna* v. *Iowa*, 419 U. S. 393, 403 (1975), this Court said unequivocally that:

> . . . the judicial power of Article III Courts extends only to "cases and controversies" specified in that Article. There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court . . . , but there must be a live controversy at the time this Court reviews the case (footnotes omitted).

This Court recently said that "a named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified." *United States Parole Commission* v. *Geraghty*, 445 U. S. 388, 404 (1980). Inasmuch as this case was never certified as a class action (*see*, footnote 3, *supra*), the only claims before this Court are the claims of the three Children, and those claims have been rendered moot by the failure of the Petitioner Morris to pursue the administrative hearing she commenced with respect to her son's 1981-82 IEP and the failure of all of the Petitioners even to demand due process hearings with respect to the 1982-83 and 1983-84 IEPs. Each of the three Petitioners has accepted without further protest the current IEPs recommended for the Children by the Board. Indeed, the Petitioner Morris has requested that her son be considered for removal from special education classes beginning January, 1984 [*See*, Affidavits of Billie

Downing, Mildred Payne, Elaine Kasian and Edgar Dyer, Apps. A, B, C and D]. Therefore, the issues presented by the closing of Jewel Manor are no longer live and the Petitioners lack a legally cognizable interest in the outcome.

II. There Is No Conflict Between the Decision of the Sixth Circuit and Any Decision of Any Other Federal Court of Appeals.

The Petition incorrectly states that there is a conflict among the Federal Courts of Appeals with respect to the questions presented by the Petition. To the contrary, the decision of the Sixth Circuit in this case is completely consistent with, and was relied upon in, the decision of the Second Circuit in a similar case, *Fallis* v. *Ambach,* 710 F. 2d 49, 56 (2d Cir. 1983). The decision of the Fifth Circuit in *Crawford* v. *Pittman,* 708 F. 2d 1028 (5th Cir. 1983). which is cited by the Petitioners, is not in conflict with the decision of either the Sixth Circuit or the Second Circuit.

The holdings in both this case and *Fallis* turn on a different issue than the one before the Fifth Circuit in *Crawford.* In this case and *Fallis,* the Circuit Courts addressed, in parallel fashion, the state and local educational agencies' ability to exercise discretion in implementing budgetary decisions. Both cases involved a state agency determination that there was an economic inability to fund a particular school at the current level. In this case, the KCHR closed Jewel Manor for budget reasons. Similarly, in *Fallis,* the New York State Department of Education sought to

reduce the rate at which local school districts were to reimburse a particular private school for providing handicapped children with a free, appropriate public education pursuant to the Act. The plaintiffs, the parents of several autistic children, sought to enjoin the rate reduction, arguing that the state agency could bring about the financial collapse of the school, effectively prompting a transfer of the handicapped children out of the school. Such a transfer, according to the plaintiffs, would be tantamount to a change in placement, thereby triggering the notice and hearing provisions of the Act. In holding for the defendants, the Second Circuit stated that the case did *not* present a case of immediate discharge but instead concerned the overall tuition reimbursement rate allowable with respect to a school. *Fallis,* at 55. Moreover, the Second Circuit stated that the case did not concern the State's obligation under 20 U.S.C. §1415 (e)(3) to maintain a child's current placement pending the selection of an alternative placement. Rather, it concerned the question of whether the State had an obligation to provide a certain funding level to an entire school to keep the school available for the placement of the plaintiffs' children. *Id.*, at 55.

In resolving the issue, the Second Circuit cited and relied on the Sixth Circuit's decision and rationale in this case, stating that the procedural safeguards of 20 U.S.C. §1415 were not meant to frustrate the fiscal policy of a State which elects to participate in the Federal program under the Act. Therefore, the plaintiffs could not use the automatic stay protection of the

Act to effectively supplant the reasoned judgment of the State in favor of their own penchants. The State was free to make decisions affecting the individual placement of a child within the existing program.

In contrast, the Fifth Circuit in *Crawford* confronted the distinct issue of the State and local educational agencies' ability to implement sweeping and inflexible policy mandates violative of the substantive requirements contained in the Act. Specifically, the record there indicated that the State categorically refused to consider special education programs that extended beyond 180 days. The Fifth Circuit held that the categorical limitations on the possible duration of the special education programs were inconsistent with the Act's insistence on IEPs formulated to meet the unique needs of each handicapped child. *Crawford,* at 1035. In so ruling, the Fifth Circuit merely required that the State not categorically initiate a wholesale policy which curtailed the children's ability to participate in a federally funded program altogether.

In light of this, it is evident that the decision in *Crawford* arises out of a wholly different factual context than the decision in either *Fallis* or this case and consequently rests on totally distinguishable legal grounds. Since these decisions are not at variance, there is no conflict between the decision of the Sixth Circuit and any decision of any other Federal Court of Appeals.

III. There Is No Conflict Between the Decision of the Sixth Circuit and Any Decision of this Court.

To date, the only decision of this Court construing the Act is *Board of Education* v. *Rowley,* 458 U. S. 176 (1982). This Court's decision in *Rowley* is completely consistent with, and was relied upon in, the decision of the Sixth Circuit in this case.

The Sixth Circuit held in this case that a change in educational placement does not in and of itself trigger, nor indeed warrant, the imposition of the procedural protections of 20 U.S.C. §1415, including the requirement imposed by 20 U.S.C. §1415 (e)(3) that the child remain in his or her "current educational placement" during the pendency of any proceeding brought under that statute. Any ruling to the contrary would effectively allow interested parties to utilize the injunctive procedure of 20 U.S.C. §1415 (e)(3) to frustrate the fiscal policy of participating states: "Nothing in the legislative history or the language of the Act implies a legislative intent to permit interested parties to utilize the automatic injunctive procedure of §1415 (e)(3) to frustrate the fiscal policy of participating states." *Tilton,* at 804.

The Sixth Circuit's decision is not, as alleged in the Petition, an infringement on the spending power of Congress. The Petitioners contend that this Court's decision in *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1 (1981), required the Sixth Circuit to hold that Jewel Manor could not be closed. The Petitioners understandably fail to disclose that this Court considered and rejected a similar argument

in *Rowley*. In that case, this Court held that Congress had not imposed on the states a limitless obligation to maximize each handicapped's child potential. This Court relied on "the fundamental proposition that Congress, when exercising its spending power, can impose no burden upon the States unless it does so unambiguously," and this Court therefore concluded that the Act imposes no such burden. *Rowley*, at n. 11 and 26. On the same reasoning, the Sixth Circuit correctly held that the Act does not impose on the states a limitless burden to continue operating a particular facility in the face of budgetary constraints.

Furthermore, as both this Court and the Sixth Circuit have recognized, "by and large, public education in our nation is committed to the control of the state and local authorities." *Tilton*, at 804 (citing *Epperson* v. *Arkansas*, 393 U. S. 97, 100 (1968)). This Court has reemphasized this holding in several recent cases:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.

Martinez v. *Bynum*, 103 S. Ct. 1838, 1843 (1983) (citing *Miliken* v. *Bradley*, 418 U. S. 717 (1974)). *See also, Plyler* v. *Doe*, 457 U. S. 202 (1982).

As this Court recognized in *Rowley*, Congress did *not* intend to take control of public education away from the state and local authorities. *Rowley*, at 713. Instead, decisions regarding placement are best left to

the state and local authorities, which are in a far better position to marshal the prevailing data, weigh the over-riding factors and ascertain the most beneficial course of action:

> Courts must be careful to avoid imposing their view on preferable educational methods upon the states. The primary responsibility for formulating the education to be accorded a handicapped child and for choosing the educational method most suitable to the child's needs was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. *Rowley,* at 712-13.

This Court went on to add that once a federal court determines that the requirements of the Act have been met, questions of methodology are for resolution by the states. Consequently, this Court held in *Rowley* that the choice of educational methods most suited to the child's needs is left by the Act to the State and local agencies. The Sixth Circuit, in view of *Rowley* and relying on this Court's reasoning in other cases, held that an interested party may not invoke the procedural injunction of §1415 (e)(3) to challenge a state or local agency budgetary determination. Therefore, there is no conflict between the decision of the Sixth Circuit and any decision of this Court.

CONCLUSION

The Petition does not present any questions that warrant review by this Court, and there are no "special and important reasons" for this Court to issue a

writ of certiorari to review those questions.[7] *Rice v. Sioux City Cemetery*, 349 U. S. 70, 77 (1955); U. S. Supreme Court Rule 17.1. The Petition should, therefore, be denied.

Respectfully submitted,

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[7]The Sixth Circuit's rejection of the facts and rationale of the District Court's decision does, however, present significant questions with respect to the construction of the Act. These questions are discussed in the Cross-Petition for a Writ of Certiorari filed by the Respondents contemporaneously with this Brief. In the event this Court decides to review the questions presented by the Petition, it should also review the questions presented by the Cross-Petition.

PROOF OF SERVICE

I, Dan C. McCubbin, one of the counsel of record for the Respondents, having been admitted to practice before the Supreme Court of the United States, do hereby certify that three (3) copies of this Brief were mailed, first class mail, postage prepaid, to Geneva Faye Parris and David Alan Friedman, Counsel for the Petitioners, Legal Aid Society, Inc., 425 West Muhammad Ali Boulevard, Louisville, Kentucky 40202, this 29th day of November, 1983.

Dan C. McCubbin

DAN C. MCCUBBIN

APPENDIX

APPENDIX A

AFFIDAVIT

MRS. BILLIE DOWNING, being duly sworn, deposes and states as follows:

1. I am the Head of the Bureau of Education for Exceptional Children in the Kentucky Department of Education (KDOE).

2. In my capacity as Head of the Bureau of Education for Exceptional Children, I am knowledgeable of the administrative proceedings required under 20 U.S.C. §1415 (b)(2) and state that records of the Bureau show the following regarding children who attended the Jewel Manor Day Treatment Center in Jefferson County, Kentucky (Jewel Manor) prior to that facility being closed by the Department, now Cabinet, for Human Resources:

Re: Brian Benton Kelly

a) On May 26, 1981, a request for an impartial hearing on behalf of Brian Benton Kelly was received by the Bureau of Education for Exceptional Children. As per standard operating procedure a hearing officer, Dr. Cecilia Arbuckle, was assigned and parties were notified by letter dated May 27, 1981.

b) On June 9, 1981, the hearing officer, Dr. Arbuckle sent letters to the parties notifying them that the hearing was scheduled for June 19, 1981. The parents' representative, Maureen Fitzgerald, then wrote Dr. Arbuckle on June 15, 1981 requesting that the hearing be rescheduled for August 7, 1981 and that the 45 day timeline be appropriately extended. A similar request from Jefferson County Public Schools was sent to Dr. Arbuckle on June 16, 1981. In response to these re-

quests, Dr. Arbuckle, by letter dated June 17, 1981, postponed the hearing until August 7, 1981.

c) On July 28, 1981, Maureen Fitzgerald, the parents' representative, notified Dr. Arbuckle of the parents' wish to withdraw their request for an impartial hearing. A letter dated August 5, 1981 from the Bureau of Education for Exceptional Children to Ms. Fitzgerald acknowledged cancellation of the hearing.

d) The Bureau of Education for Exceptional Children has received no further contacts from the parents or the parents' representative, Ms. Fitzgerald, indicating any interest in pursuing the administrative remedies available through this Bureau.

Re: Michael Sowder

e) On June 3, 1981, a request for an impartial hearing on behalf of Michael Sowder was received by the Bureau of Education for Exceptional Children. As per standard operating procedure, a hearing officer, Dr. William E. Greenlee was assigned, and parties were notified of the assignment by letter dated June 4, 1981.

f) Deborah Knapp, Coordinator of Procedural Safeguards at that time, met with Judi Davis, parents' representative, on June 23, 1981. The purpose of that meeting was to review procedures relative to the conduction of due process hearings. Following this meeting, Ms. Knapp sent a letter dated June 25, 1981, offering any further technical assistance needed on procedures relative to the hearing process.

g) Judi Davis, parents' representative, by letter dated July 6, 1981 wrote Dr. Greenlee, the hearing officer, and requested an extension of the 45 day timeline in order to examine records, gather evidence, and prepare for the case. Dr. Greenlee responded with a July 10, 1981

letter approving her request, and extending the timeline to August 7, 1981.

h) Dr. Greenlee was next contacted regarding the hearing by a July 30, 1981 letter from Jefferson County Public Schools. The letter confirmed that August 27, 1981 had been set as the date of the hearing, and requested that the timeline be extended for an additional 45 days. Dr. Greenlee approved this second request for extension by letter dated August 4, 1981, and notified all parties of the scheduled date for the hearing.

i) On August 24-25, 1981, Judi Davis, parents' representative, and Dan McCubbin, district's representative, sent letters to Dr. Greenlee requesting postponement of the hearing scheduled for August 27, 1981. The letters indicated that the parties wished to attempt mediation to resolve the remaining issues of concern.

j) Since no further correspondence was received from the parties regarding rescheduling of the due process hearing, the Bureau of Education for Exceptional Children sent a letter to Mr. Davis clarifying the status of the case. The November 20, 1981 letter noted that previous extensions of the timelines had run out in September, and it would be necessary to contact the hearing officer to obtain a specific extension date in order to keep the case active.

k) No specific extension was obtained by Ms. Davis, therefore on January 9, 1982, another letter was sent. This letter indicated that since Ms. Davis had not requested a specific extension date in response to our request, the Bureau of Education for Exceptional Children was considering the hearing request cancelled.

l) The Bureau of Education for Exceptional Children has received no further contact from the parents or parents' representative, Ms. Davis, indicating any in-

terest in pursuing further the administrative remedies available through this Bureau.

Re: Del Shawn Morris

m) On June 2, 1981, a request for an impartial hearing on behalf of Del Shawn Morris was received by the Bureau of Education for Exceptional Children. As per standard operating procedure a hearing officer, Ms. Natalie Patterson, was assigned, and parties were notified of the assignment by letter dated June 4, 1981.

n) Deborah Knapp, Coordinator of Procedural Safeguards at that time, met with Judi Davis, parents' representative on June 23, 1981. The purpose of that meeting was to review procedures relative to the conduction of the process hearings. Following this meeting, Ms. Knapp sent a letter dated June 25, 1981 offering any further technical assistance needed on procedures relative to the hearing process.

o) Judi Davis, parents' representative, by letter dated July 2, 1981, wrote Ms. Patterson, the hearing officer, and requested an extension of the 45 day timeline, in order to examine records, gather evidence, and prepare for the case. Ms. Patterson responded with a July 7 letter approving her request.

p) On July 16, Ms. Patterson notified all parties by letter that a hearing date of August 14, 1981 had been selected. She was next contacted August 7, 1981 by the district's representative, Dan McCubbin, who stated that the parties had agreed to a temporary placement and wished to attempt mediation to resolve issues regarding related services and counseling. To this end, he and Ms. Davis, the parents' representative, both submitted a joint request for postponement of the August 14, 1981 hearing. A letter granting this request was sent August 11, 1981.

q) Since no further correspondence was received from the parties regarding rescheduling of the due process hearing, the Bureau of Education for Exceptional Children sent a letter to Ms. Davis clarifying the status of the case. The November 20, 1981 letter noted that previous extensions of the timelines had run out in September, and it would be necessary to contact the hearing officer to obtain a specific extension date in order to keep the case active.

r) No specific extension was obtained by Ms. Davis, therefore on January 8, 1982, another letter was sent. This letter indicated that since Ms. Davis had not requested a specific extension date in response to our request, the Bureau of Education for Exceptional Children was considering the hearing request cancelled.

s) The Bureau of Education for Exceptional Children has received no further contacts from the parents or the parents' representative, Ms. Davis, indicating any interest in pursuing further the administrative remedies available through this Bureau.

3. That at the present time, to the best of my knowledge, there are no administrative proceedings pending before the KDOE involving Timothy Tilton, Robert McDaniel, Del Shown Morris, or any other child who attended Jewel Manor.

Subscribed and sworn to before me by Billie R. Downing this 22nd day of November, 1983.

(s) Billie R. Downing
Billie R. Downing, Affiant

My commision expires: October 31, 1987
(s) Janet L. W. Cummins

APPENDIX B

AFFIDAVIT

MILDRED PAYNE, being duly sworn, deposes and says as follows:

1. I am a Regional Placement Specialist employed by the Board of Education of Jefferson County, Kentucky (the "Board"). I am the Chairperson of the Regional Admissions and Release Committee ("RARC") for Timothy Tilton.

2. Prior to January, 1983, Timothy was enrolled in a Behavior Disordered ("BD") program at Prestonia Environmental School, a special education school operated by the Board.

3. At a meeting of Timothy's RARC held on January 3, 1983, the RARC recommended that Timothy's placement be changed from the BD program at Prestonia Environmental to a Learning Disabilities ("LD") special class at Lowell Elementary School, a regular school operated by the Board. The rationale for this recommendation was input from the RARC members and verbal reports from school personnel and Timothy's grandmother, Mona Richards (who is Timothy's guardian).

4. Timothy's grandmother was present at the January 3, 1983 RARC meeting, and she signed the summary report of the meeting. Timothy's grandmother has not protested his placement at Lowell Elementary.

5. As of the date of this Affidavit, Timothy remains enrolled in the LD special class at Lowell Elementary. Based on reports from school personnel, he is making satisfactory progress in that program.

Dated: 11/18/83

(s) Mildred E. Payne
Mildred E. Payne

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } SS:

The foregoing Affidavit was subscribed and sworn to before me, a notary public, by Mildred Payne on November 18, 1983.

(s) Georgiana Claycomb
Notary Public

My commission expires: 1-20-86

APPENDIX C

AFFIDAVIT

ELAINE KASIAN, being duly sworn, deposes and says as follows:

1. I am the Head Teacher of Prestonia Environmental School, a special education school operated by the Board of Education of Jefferson County, Kentucky (the "Board"). I am also the Chairperson of the School Based Admissions and Release Committee ("SBARC") for Robert McDaniel.

2. Robert's current Individual Education Program ("IEP") was adopted by his SBARC on October 3, 1983. Robert's IEP provides that he will remain enrolled in a Behavior Disordered ("BD") program at Prestonia Environmental. In this program, Robert receives special education classes, special transportation and individual counseling.

3. Robert's current IEP has not been protested by his grandmother, with whom he now lives, or by his mother.

4. As of the date of this Affidavit, Robert remains enrolled in the BD program at Prestonia Environmental. Based on reports from school personnel, Robert continues to meet the criteria for special school placement.

Dated: 11/18/83

(s) Elaine A. Kasian
Elaine Kasian

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } SS:

The foregoing Affidavit was subscribed and sworn to before me, a notary public, by Elaine Kasian on November 18, 1983.

(s) Georgiana Claycomb
Notary Public

My commission expires: 1-20-86

APPENDIX D

AFFIDAVIT

EDGAR DYER, being duly sworn, deposes and says as follows:

1. I am a Counselor employed by the Board of Education of Jefferson County, Kentucky (the "Board"). I am the Chairperson of the School Based Admissions and Release Committee ("SBARC") for Del Shawn Morris.

2. At a meeting of Del Shawn's SBARC held on October 4, 1983, the SBARC recommended that Del Shawn continue in his present educational placement at Meyzeek Middle School, a regular school operated by the Board. In this placement, as provided in Del Shawn's Individual Education Program, he is enrolled in a Behavior Disordered ("BD") Resource Program for language arts, social studies and science, and is enrolled in regular classes with non-handicapped students for mathematics and two electives.

3. Del Shawn's mother, Regina Morris, attended the October 4, 1983 SBARC meeting, and she signed the summary report of the meeting. Mrs. Morris wanted to review Del Shawn's progress at the end of January, 1984. She wants Del Shawn in all regular classes in January, 1984, if possible. Normally, reviews are held once a year.

4. As of the date of this Affidavit, Del Shawn remains enrolled in the BD Resource Program at Meyzeek Middle. Based on reports from school personnel, he is making satisfactory progress in that program.

Dated: 11/18/83

(s) Edgar Dyer
Edgar Dyer

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } SS:

The foregoing Affidavit was subscribed and sworn to before me, a notary public, by Edgar Dyer on November 18, 1983.

(s) Georgiana Claycomb
Notary Public

My commission expires: 1-20-86

Office - Supreme Court, U.S.
FILED
JAN 5 1984
ALEXANDER L. STEVAS
CLERK

No. 83-781

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

TIMOTHY TILTON, Et Al. - - - Petitioners

versus

JEFFERSON COUNTY BOARD OF EDUCATION, Et Al. - - - - Respondents

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 2, 1984

WESTERFIELD-SONTE CO., 619 W. KENTUCKY-P.O. BOX 3291, LOUISVILLE, KY.

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IN THE

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TIMOTHY TILTON, ET AL. - - - *Petitioners*

v.

JEFFERSON COUNTY BOARD OF EDUCTION, ET AL. - - - - *Respondents*

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTRODUCTION

The Petitioners respectfully submit this reply brief in support of their Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. This brief replies to the argument of mootness, which was first raised in the Respondents' Brief in Opposition to the petition.

SUMMARY OF ARGUMENT

This case is not moot for two reasons. First, each of the named Petitioners retains a legally cognizable interest in the outcome of this litigation. Even if the claims of the named Petitioners were moot, they must be presumed to be representatives of a properly pled class, whose members have an actual controversy with

the Respondents. Second, the importance of the issue presented mitigates against any finding of mootness.

ARGUMENT

I. THIS CASE IS NOT MOOT

Citing familiar principles of Article III limitations on judicial review, the respondents contend that this case is now moot. They have supplied affidavits reciting the current educational placement of each of the named petitioners, suggesting that these placements compel a conclusion of mootness. Careful examination of the relief sought in the children's complaint and the issues central to the merits of this case demonstrates the inadequacy of respondents' position.

A. The Case Is Not Moot as to the Named Petitioners.

Any consideration of mootness must analyze the particular facts presented as well as the nature of the relief sought. Here, Jewel Manor provided the only year-round educational program and offered these children additional unique educational features. *See* Petition for Writ of Certiorari ("Petition"), at 4. When Jewel Manor was closed, no year-round educational program was available; these children were deprived of year-round education and the other unique features of the Jewel Manor program, a deprivation they continue to suffer today. Alternative, but not comparable,

educational placement is no substitute for the programs which were lost when Jewel Manor closed.[1]

Each of the children named as a petitioner is still enrolled in the Jefferson County School system. Affidavits B, C and D, Respondents Brief, at 24-29. Should this Court grant a Writ of Certiorari and reverse the decision of the Sixth Circuit, there is no reason why Jewel Manor could not be reopened. In the alternative, the children could be placed in an educational program comparable to that provided at Jewel Manor at the time it closed. In either event, these children would receive some of the relief prayed for in their complaint, compensating them partially for harm suffered as a result of any violation of their statutory rights. Their claims are therefore not moot.

In addition to being situated such that they can obtain partial relief from the respondents' past conduct, these children have a cognizable interest in preventing repetition of this conduct. An action will not be deemed moot unless the controversy between the parties no longer exists and "there is no reasonable expectation" that it will recur in the future. *U. S.* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953).

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[1]The petitioners' decision not to complete the administrative process does not render this case moot. *See* Respondents' Brief, at 9. This suit was filed to prevent any change in the children's placement. When the suit was summarily dismissed shortly after its filing, the parents and guardians had no reason to believe that they could obtain relief by resort to an administrative process that had been previously unresponsive when it closed Jewel Manor without any parental imput.

As detailed above, a controversy continues to exist between the parties as to the specific educational program to which the children are currently entitled. Moreover, so long as these petitioners attend school in the Jefferson County system, and so long as the Sixth Circuit's judicially created "cost exception" exists, there is every expectation that the controversy will recur.

The Sixth Circuit held that local authorities may escape the procedural requirements of 20 U.S.C. §1415 (e)(3) by asserting that a change in educational placement is due solely to financial constraints. *Tilton* v. *Jefferson County Bd. of Education,* 705 F. 2d 800 (6th Cir. 1983). Every time that these respondents allege that budgetary considerations require a change in the children's placement, either by changing program content or closing a facility, they will be free to do so without regard for the procedural requirements of §1415 (e)(3).[2]

This case is not moot where the challenged act is capable of repetition and where, as here, the petitioners have a personal stake in preventing repetition. *See, e.g., Carroll* v. *President & Commissioners,* 393 U. S. 175 (1968) (appeal from injunction against political rallies not moot although the injunction expired prior to adjudication), and *Super Tire Engineering Co.* v. *McCorkle,* 416 U. S. 115 (1974) (challenge to payment of welfare benefits to striking workers not moot although strike had ended). The continued existence of

[2]Indeed, federal law mandates that each child's educational placement be reviewed at least annually. 34 C.F.R. §300.343(d).

the cost exception to §1415(e)(3) has a direct effect on the named petitioners' current educational placement and a reasonable expectation of affecting their future educational programming. The case is therefore not moot as to them.

B. This Case Is Not Moot as to the Class Which the Children Seek to Represent.

This Court has had repeated occasion to "demonstrate the flexible character of the Art. III mootness doctrine." *United States Parole Commission* v. *Geraghty,* 445 U. S. 388, 401 (1980). The cases illustrate that "[e]ach case must be decided on its own facts." *Id.,* at 406, n. 11. The peculiar procedural history of this case aside, respondents' selective recitation of the case law concerning mootness in light of class litigation fails to provide the full picture.

Even if this Court should conclude that the claims of the named children are moot, a dismissal for mootness does not automatically follow. Undoubtedly, where a class has been certified, the extinction of the named plaintiff's claim on appeal does not render the case moot, providing there is an actual controversy "between a named defendant and a member of the class represented by the named plaintiff. . . ." *Sosna* v. *Iowa,* 419 U. S. 393, 402 (1975). Moreover, this Court has "held that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been *denied.*" *Gergahty,* 445 U. S. at 404 (emphasis added).

Here, the District Court's order made no reference to petitioners' class allegations. Petition, at 30. The case was summarily dismissed *sua sponte* nine days after filing. No opportunity was afforded for filing a motion for certification of the class.[3] It is readily apparent, however, that the complaint contains properly pled allegations on behalf of a class and sub-class. Petition, at 36-37.

Federal courts have held that "pending certification, class status must be presumed." *Smith* v. *Josten's Am. Yearbook Co.*, 78 F.R.D. 154, 168 (D. Kans. 1968). *See also, Kahan* v. *Rosenstiel*, 424 F. 2d 161, 169 (3d Cir.) *cert. denied*, 398 U. S. 950 (1970). The instant case presents a summary dismissal that left no opportunity for a formal class certification motion and contained no findings regarding the proposed class.

This Court has noted that certain cases may exist "in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification." *Sosna*, U. S. at 403, n. 11. Here, where the District Court's action precluded pursuit of class certification, class certification should be held to "relate back" to the original claims for injunctive and declaratory relief. *See Sosna* and *Geraghty, supra.* Even if their personal claims are deemed moot, petitioners should thus be afforded the opportunity to proceed as a putative class, on behalf of the large class of students

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[3]Local rules afford ninety (90) days for filing a motion for class certification. Rule 18(b), Local Rules of the United States District Court for the Western District of Kentucky.

whose individual educational placements were unilaterally changed and who were given no opportunity to avail themselves of the procedural protections of §1415 (e)(3).

II. THE IMPORTANCE OF THIS COURT'S RULING ON THE PROCEDURAL PROTECTIONS OF THE ACT MITIGATES ANY CONSIDERATION OF MOOTNESS.

Regardless of any asserted mootness, significant issues remain concerning the propriety of a judicially created cost exception to procedures mandated by Congress and held fundamental by this Court. *Board of Education* v. *Rowley,* 458 U. S. 176, 206 (1982).

Some commentators have gone so far as to suggest a "public interest exception" to the mootness doctrine. *See, e.g.,* Diamond, *Federal Jurisdiction to Decide Moot Cases,* 94 U. Pa. L. Rev. 125, 138 (1946), and Newberg, *Class Actions,* §1099, Vol. I, at 151 n.24. While we do not contend that a "public interest exception" alone saves a case from mootness, the continued vitality of petitioners' individual and class claims are bolstered by consideration of the public importance of this case. The cost exception created by the Sixth Circuit has already been cited with approval by the Second Circuit. *Fallis* v. *Ambach,* 710 F. 2d 49 (2d Cir. 1983).

The budgetary loophole created by the Sixth Circuit flies in the face of this Court's reasoned analysis in *Rowley* and effectively guts the Act. The Act provides a clear legislative mandate that handicapped children

are not to be treated in an educationally inferior manner, even though their education may be more costly than that for a non-handicapped child. The Sixth Circuit has provided a powerful tool for financially strapped states, allowing them to circumvent the Act's requirements and effectively reducing the Act to mere verbiage. Handicapped children are the most difficult and most expensive to educate, yet the Sixth Circuit has paved the way for states to cut corners when it comes to educating the handicapped. Surely this is not what the drafters of the Act contemplated.

CONCLUSION

This Court has emphasized that "each case must be decided on its own facts," *Geraghty,* 445 U. S. at 405, n.11, and that formalistic Article III jurisprudence "is riddled with exceptions." *Id.* Petitioners do not suggest a radical departure from the Court's continued analysis of the mootness doctrine. To the contrary, the "practicalities and prudential considerations," *Geraghty, id.,* compel the conclusion that this case is not moot. For the foregoing reasons, and those contained in the Petition, a Writ of Certiorari should issue.

Respectfully submitted,

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PROOF OF SERVICE

We, Geneva Faye Parris and David Alan Friedman, counsel of record for the Petitioners, having been admitted to practice before the Supreme Court of the United States, do hereby certify that three (3) copies of this Reply Brief were mailed, first class mail, postage prepaid, to Dan C. McCubbin, Counsel for the Cross-Petitioners, 3332 Newburg Road, Louisville, Kentucky 40218, this 4 day of January, 1984.

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APPENDIX

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Local Rules of the United States District Court for the Western District of Kentucky

RULE 18. CLASS ACTIONS

(a) Contents of Complaint. A complaint or other pleading asserting a class action shall contain sufficient allegations to identify the class and the claim as a class action, including but not necessarily limited to:

(1) The approximate size and definition of the alleged class;

(2) The basis upon which the party or parties maintaining the class action or other parties claimed to be representing the class are alleged to be adequate representatives of said class;

(3) The alleged questions of law and fact claimed to be common to the class.

(b) Motion for Certification. Unless the Court otherwise orders, the party asserting a class action shall within ninety (90) days after the filing of a pleading asserting the existence of a class, move for a determination under Rule 23(c)(1), Federal Rules of Civil Procedure, whether the action is maintainable as a class action and, if so, the membership of the class. If no such motion is filed, the Court may enter an order that the action is not maintainable as a class action. Nothing in this rule shall preclude a motion by any party at any time to strike the class action allegations or to dismiss the complaint.